Lexus of Concord, Inc. *and* Machinists Automotive Trades District Lodge 190, Local Lodge 1173 International Association of Machinists and Aerospace Workers, AFL–CIO. Cases 32–CA–17396 and 32–CA–17442

April 28, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On February 3, 2000, Administrative Law Judge Joan Wieder issued the attached decision. The Charging Party Union filed exceptions to the judge's decision, the General Counsel filed limited cross-exceptions and a supporting brief, the Charging Party separately filed a response and joinder to the General Counsel's limited cross-exceptions, and the Respondent filed an opposition to the General Counsel's limited cross-exceptions. Thereafter, the General Counsel filed a motion to withdraw its limited cross-exception No. 1.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Lexus of Concord, Inc., Concord, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Insert the following as paragraph 1(e) and reletter the subsequent paragraphs accordingly.

"(e) Furnish the information that the Union's attorney requested on June 15, 1999."

[1] No exceptions were filed to the judge's finding that the Respondent's preceding unfair labor practices tainted its withdrawal of recognition from the Union, that the Respondent withdrew recognition from the Union before a reasonable period of time for bargaining had elapsed following the Respondent's execution of a settlement agreement, and that the Respondent thus violated Sec. 8(a)(5) and (1) of the Act by its withdrawal of recognition. In cross-exception No. 1, the General Counsel excepted to the judge's failure to find that the Respondent violated Sec. 8(a)(5) and (1) on the additional ground that recognition was withdrawn in the absence of a Board-conducted election establishing that the employees no longer desired representation by the Union. Subsequently, the General Counsel moved to withdraw that exception. The Charging Party had joined that cross-exception, but it took no position on the General Counsel's motion to withdraw it.

We grant the General Counsel's motion to withdraw the cross-exception, and assuming that the issue is still technically raised before us by the Charging Party, we find it unnecessary to pass on it since it is merely an additional theory for the violation found.

[2] Both the General Counsel and the Charging Party Union have excepted to the judge's failure to include in her Order a provision requiring the Respondent to provide requested information that the Respondent unlawfully refused to furnish. We shall modify the judge's Order to include an affirmative provision directing that the Respondent supply the information sought.

Valerie Hardy-Mahoney, Esq., for the General Counsel.
Karen A. Sundermier, Esq. and *Alan S. Levins, Esq. (Littler Mendelson*), of San Francisco, California, for the Respondent.
Jesse Juarez, of Concord, California, for the Charging Party.
David A. Rosenfeld, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld), for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

JOAN WIEDER**,** Administrative Law Judge**.** This case was tried on October 27, 1999, at Oakland, California.[1] The charges were filed by the International Association of Machinists and Aerospace Workers, Local Lodge 190 (Union or Charging Party). The charge in Case 32–CA–17396 was filed on April 26, the original charge in Case 32–CA–17442 was filed on May 14, and amended on June 4 and October 12. These charges against Lexus of Concord, Inc. (Lexus or Respondent) allege Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). The Regional Director for Region 32, issued a consolidated complaint and notice of hearing on June 30, 1999, and issued an amended consolidated complaint on October 12, 1999, which was amended at hearing.[2]

Specifically, the complaint asserts Respondent violated Section 8(a)(5) and (1) by: (1) making unilateral changes to its 401(k) pension plan for unit employees; (2) making unilateral changes in its wage rates for unit employees; (3) directly dealing with unit employees regarding the wage rate changes; (4) failing to provide relevant requested information and, (5) withdrawal of recognition when such withdrawal was tainted by Respondent's unremedied unilateral change in the unit employees' 401(k) pension plan. Also in issue is whether a reasonable period of time passed between the settlement agreement in Cases 32–CA–16867, 32–CA–16882, 32–CA–16920, 32–CA–16988, 32–CA–17080, and 32–CA–17107–1 and Respondent's withdrawal of recognition from the Union.

Respondent's timely filed answer to the complaint, as amended, admits certain allegations, denies others, and denies any wrongdoing. Respondent claims the following affirmative defenses: (1) the complaint does not state facts sufficient to constitute an unfair labor practice since it does not state a claim upon which relief may be granted; (2) the violations contained in the complaint are insufficient to state a violation of the Act; (3) the charge is barred by Section 10(b) of the Act; (4) any actions taken by Respondent were taken for lawful and compelling business reasons; (5) the complaint and each cause of action therein is barred, either in full or part, by the equitable doctrine of unclean hands; (6) each cause of action is barred either in full or in part by the equitable doctrines of laches and estoppel and, (7) that any statements made by Respondent or its agents are protected by Section 8(c) of the Act. Respondent requests dismissal of the complaint in its entirety. For the reasons stated below, Respondent's motion to dismiss the complaint is denied. Respondent has failed to adduce any evidence

[1] All dates are in 1999 unless otherwise indicated.

[2] Respondent opposed the motion to amend the complaint, or in the alternative, moved to postpone the trial. These motions were denied.

in support of these affirmative defenses and I find them without merit.

All parties were given full opportunity to appear and introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs.

Based on the entire record, from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs, I make the following[3]

FINDINGS OF FACT

I. JURISDICTION

Based on Respondent's answer to the consolidated complaint, as amended, I find Lexus of Concord, Inc. meets one of the Board's jurisdictional standards and the Union is a statutory labor organization.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent, a California corporation, operates a car dealership in Concord, California, where it is engaged in the sale and service of new and used automobiles. Hank Torian,[4] is Respondent's owner, Ali Zuganeh its general manager, Tedd Romano its service manager, Don Carvalho was the service and parts manager for Tasha Corporation, a management company, which prior to around March was managed by Respondent, and is currently the service and parts director at Fremont Toyota, which is also owned by Torian; Christine Carvalho is Respondent's business manager; and, John Sharkey was Tasha Automotive Group's director of human resources until around July or August 1999.

The Charging Party engaged in organizing Respondent in 1997. An election was held August 1 and on August 11, 1997, the Union was certified as the collective-bargaining representative of the following unit:

> All full-time and regular part-time technicians, parts department employees, including parts drivers, and detailers, employed by Respondent at its Concord, California facility; excluding sales employees, all other employees, office clerical employees, and parts managers, guards, and supervisors as defined in the Act.

The parties met for negotiations 19 times from September 1997, to April 14, 1999.[5] A Federal mediator participated in four of the negotiating sessions.[6] Respondent admittedly withdrew recognition of the Union on April 27, 1999. Counsel for the The The General Counsel avers Respondent is not privileged to withdraw recognition based on a unilateral settlement agreement executed February 11, settling Cases 32–CA–16867, 32–CA–16882, 32–CA–16920, 32–CA–16988, 32–CA–17080, and 32–CA–17107–1. The first of these charges was filed July 9, 1998. The charges alleged Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith by: making unilateral changes in the method of calculating holiday pay for unit employees; by unilaterally eliminating a bargaining unit position; directly dealing with bargaining unit employees; violating Section 8(a)(3) and (1) of the act by terminating employee Dale Vining because of his union activities; and violated Section 8(a)(1) of the Act by interrogating employees regarding their union activities and threatening employees.

The informal settlement agreement included the posting of a notice to employees. On February 12, the Acting Regional Director approved the settlement agreement and informed the Respondent by letter of the same date it was required to comply with the settlement agreement. Respondent posted the notice on or about February 16. The notice was to be posted for a period of 60 days. The notice included, as here pertinent, the following provisions:

> WE WILL NOT unilaterally change our policy of paying unit employees holiday pay for the 4th of July holiday, regardless of whether employees are scheduled to work or not that day, or abolish the detailer/utility-person position without prior notice and opportunity to bargain with the Union.
>
> WE WILL NOT bargain directly with unit employees, bypass, or undermine the Union as the exclusive collective bargaining representative of our employees within the bargaining unit set forth below . . . and WE WILL bargain in good faith with Machinists Automotive Trades District Lodge 190, Local Lodge 1173, International Association of Machinists and Aerospace Workers, AFL–CIO, the exclusive bargaining representative of our employees within the following appropriate bargaining unit. . . .
>
> WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the National Labor Relations Act.
>
> WE WILL rescind our unilateral change of the 4th of July holiday pay policy, and make employees whole for any loss of wages and benefits as a result of the unilateral change.

Also on February 16, Don Carvalho sent an interoffice memo to Respondent instructing the notice should be posted for 60 days and "[A]fter the 60 day period and our compliance with the terms of the settlement, the unfair labor practice charges are officially resolved, and we will be able to move forward to deal with the Union issues at our Dealership without this threat hanging over our heads."

1. Alleged unlawful unilateral change in the 401(k) plan

According to Don Carvalho's undisputed testimony, Tasha Automotive Group sold eight dealerships to Auto Nation. Three of Tasha Groups dealerships were not included in the transaction, Lexus of Concord, Stevens Creek Lexus, and Fremont Toyota. Sharkey admitted negotiations for the acquisition commenced in December 1998 and the official date of the acquisition was March 26. Respondent admittedly did not inform the Union of the sale negotiations or any of the potential sequelae of such a transaction. None of Respondent's witnesses admitted to being a participant in these negotiations and there was no testimony of whether the sale and transfer would affect Respondent's employees was discussed by Tasha Group's repre-

[3] I specifically discredit any testimony inconsistent with my findings.

[4] Hank Torian is a contraction of this individual's name, which is Henry Khachatorian.

[5] The parties stipulated negotiations were conducted on the following dates:

September 11, October 14, November 6, and December 1 and 10, 1997; February 11 and 27, March 27, April 16, May 12, June 25, July 8, August 12, September 4, October 2 and 23, November 16, and December 18, 1998; and April 14, 1999.

[6] These were the October 2 and 23 and November 16, 1998, and April 14, 1999 sessions.

sentative and Auto-Nation. Respondent failed to explain why such representatives did not appear and testify. As a result of the sale, according to Sharkey, Respondent, Stevens Creek Lexus, and Fremont Toyota were formed into limited liability corporations; they were spun off from the, quote, "Tasha Corporation," and became independent dealers.

After the sale, Respondent and the Union met to continue negotiations on a collective-bargaining agreement on April 14. Respondent still did not inform the Union of the sale and spin-off of Lexus of Concord or any of the sequelae resulting from these actions. While Respondent argues on brief that the April 14 meeting did not include negotiations, I find this argument to be without merit. Initially, Respondent stipulated negotiations occurred on April 14 at the commencement of the trial. Additionally, Jesse Juarez,[7] a union organizer and participant in this negotiation, testified convincingly the parties discussed the three outstanding issues, union security, pension, and health and welfare. Nick Antone, the Union's area director and chief negotiator, after asking "about the three issues that were left open, said to them—and there was a lot of flexibility with all those three issues. And we were hoping to come to an agreement." Also in issue was the term of the agreement.

At this meeting, the union representatives asked Respondent if they were dealing with Tasha Group because they heard rumors of the sale. Respondent's counsel, Scott Rechtschaffen, replied "no." Antone read an information request and claimed they heard rumors Respondent was making unilateral changes without bargaining with the Union. According to Juarez, some of the information requested related to "rates of pay, classifications, employee benefits, co-payments, and 401(k) contributions from the employer to the employees. Respondent's counsel, Sundermier, responded she would obtain the information and provide it to the Union. There was no mention the sale of a portion of Tasha Group necessitated any changes to the 401(k) pension plan. The parties agreed to resume negotiations after the Union received the requested information.

Rechtschaffen acted surprised at the allegation of unilateral changes and asked for examples. Juarez gave as examples: "that they had changed a detailer to a parts driver, and put him back. They changed some detailer scheduling. They had unilaterally changed one of the service technicians from an hourly wage to a flat rate. And they had changed a parts [sic] a gal into the parts runner." In response Rechtschaffen stated: "We've got to do what we have to do to run our business." There is no claim any of these alleged changes were unilateral changes in violation of the Act.

The Union followed up the information request by letter dated April 16. The letter included a request for "[E]ach employee's participation in the Employer's 401(k) plan and the amount the Employer contributes to each person's 401(k) account." In another letter to Respondent containing the same date, the Union stated:

> We, of course, demand that if there are any wage increases or benefit increases which would have normally occurred without the Union, those should be implemented in the normal course of business. We insist, however, being notified in advance of any such changes so that we can bargain over those changes. Included in the bargaining will most likely be a demand that the wage increases or other benefit changes be better than otherwise proposed. Nonetheless, Board law requires these changes be put into place and furthermore requires that you afford the Union a chance to bargain over those decisions as well as the effects of those decisions.[8]

At some time prior to April 1, with an effective date of April 1, Respondent created the Lexus of Concord 401(k) plan. The Union was not informed of this new plan at the April 14 negotiating session. Respondent admitted it did not inform the Union of the new plan. Respondent avers the new plan contained de minimis changes, was required by the sale to Auto Nation and the statutory requirements of the Internal Revenue Service (IRS). No expert on the requirements of the IRS appeared and testified. No one who participated in the sale negotiations with Auto Nation, including whether the effects of the sale would, a fortiori, require the changes approved by Respondent's board of directors on March 31. No reason for this failure was advanced on the record.

The directors, Torian and Donna Gondola, executed a unanimous written consent, based on their belief

> it is in the best interest of Concord Automobile Dealership, LLC (Company) to assist its employees in saving for their retirement; and . . . the Board of Directors has considered the possibility of maintaining a 401(k) profit sharing plan for its employees; [adopted the resolution to] establish a 401(k) profit sharing plan as of April 1,1999; and . . . that the proper officers of the Company be, and hereby are, authorized and directed to execute the plan on behalf of the Company and to do and perform any and all further acts or things to make, execute, acknowledge, and deliver all document necessary to carry out the intent of the foregoing resolutions.

There is no claim in this resolution or other evidence that the changes were all required by law or otherwise, dictating the taking of an adverse inference. *Property Resources Corp. v. NLRB*, 863 F.2d 964 (D.C. Cir. 1988). Even absent an adverse inference, there is no predicate to support the conclusion these changes were mandated by law. On the contrary, the written consent was based on the directors' belief their action was in the best interest of the employers, not on legal mandates.

Between mid to late April, Respondent held an employee meeting in front of the "Notice to Employees" to announce the changes to their 401(k) plan. The meeting was called by Romano and Chris Carvalho who attended for Respondent. Romano did not appear and testify. Respondent distributed to the employees a written, undated explanation of the changes to their 401(k) plan. The memorandum stated in bold letters: "The recent sale of the Tasha Automotive Group to Republic Industries [Auto Nation] has prompted several changes and enhancements to the 401(k) plan." There was no claim in this missive that the sale required the changes. There is no claim in this missive Respondent could not have negotiated with the Union concerning the changes.

There is a dispute concerning the date of the meeting. Chris Carvalho testified she did not meet with the employees and distribute the memorandum until April 29.[9] Employee Bruce

[7] Juarez testified in an open and direct manner. Based on his demeanor, I credit his testimony.

[8] A draft of this letter was also read at the April 14 negotiating session, including the above-quoted demand.

[9] While Chris Carvalho testified she was not told of the changes to the 401(k) plan until April 21, at a meeting at the Tasha Automotive Group office, her testimony was not credibly corroborated. There was no explanation for Respondent's failure to call the other attendees,

Licthi testified the changes were announced in mid-April because at the time of the announcement the new plan had already been in effect a couple of weeks.[10] Based on his direct manner in testifying, I credit the testimony of Licthi. He appeared earnestly interested in testifying accurately. According to Lichti, management informed the employees "since they had sold the business, they had to close everything out. And since it was under a new name, everybody was immediately vested in the old plan." The employees applauded the announcement because "You know, a lot of people had been there—formerly, there was a seven-year vesting period." Other changes to the 401(k) plan, according to Sharkey, who admitted the administration of such plans is "very complex," included the immediate 100 percent of vesting of all employees as of April 1, no additional waiting period for all persons on the payroll as of a July 1 enrollment date, the issuance of statements quarterly which will be mailed to the employees residence; as of April 1, the employees were given internet and telephone access to their balances with the ability to move their money between funds daily rather than quarterly under the "old" plan. The new plan also eliminated the ability of the employees to make changes to their account using paper transactions. The only way they could access their accounts was through a personal PIN number.

Sharkey testified these changes to the 401(k) plan were mandated by actions taken by Auto Nation to freeze the plans and by IRS regulations. Sharkey admittedly did not participate in the determination to make the changes and I find his testimony is not credible. He engaged in surmise. He never asserted Respondent could not meet its obligations under state and Federal mandates if it bargained with the Union about any of the changes. Sharkey admitted he did not understand the requirements of these mandates. He did not participate in the sale negotiations, so he does not know if Auto Nation's actions were previously discussed during the negotiations and whether Respondent knew in advance that Auto Nation intended to freeze the Tasha Automotive Group 401(k) plan, as announced in its letter of April 1, a copy of which was sent to Gondola who forwarded it to Sharkey. In fact, that Respondent had approved another plan prior to April 1 clearly demonstrates the matters were discussed with and acted on by Respondent prior to April 1.[11] Sharkey admitted there were some changes to the 401(k) plan in March.

Inasmuch as Sharkey engaged in surmise, and did not appear open and direct in his testimony, I will credit his testimony only where it is credibly corroborated or constitutes an admission against Respondent's interests. For example, Sharkey testified why the changes were made, but admitted he did not know who made the changes and he lacked the requisite expertise to state what changes were mandated by law, if any. He even admitted he did not specifically know why the changes were made. Sharkey further admitted he did not know if other substantive changes were made to the 401(k) plan because he did not compare the new to the old plan.[12] While Respondent claims on brief the changes were mandated by IRS regulations, there was no testimony confirming this claim. Sharkey testified he did not know if any of the changes to the 401(k) plan were mandated by law and that he was not "a technician in the 401(k) plan, so I didn't know the ramifications [of the sale of a part of the Tasha Group upon those dealerships not included in the sale.]" In fact, Sharkey's testimony somewhat contradicts this claim. When asked about the establishment of quarterly statements, he replied:

> Standard Insurance Company was trying to establish a more frequent access to employees' account funding, their values; and, therefore, they went to a toll free number and a website for the employees to accomplish that. It was simply to keep the information fresh for all members of the plan to access their accounts.

There is no claim this or any of the other changes were mandated by any state or Federal Regulation. Respondent failed to introduce such regulations into evidence or notify the other parties to this proceeding that it was requesting judicial or other notice of any specific regulations or laws. Thus, opposing counsel was denied the opportunity to argue the applicability or import of such regulations. In sum, after reviewing the cited regulations, I find Respondent has failed to establish any State or Federal regulations required Respondent to make the above-described unilateral changes to its 401(k) plan without notice and without bargaining with the Union about the modifications and their effects.

2. Withdrawal of recognition

Don Carvalho received, on or about April 19, a petition signed by 19 of Respondent's 24 unit employees. One employee signed the petition on April 17 and the rest signed on April 19. The petition stated:

> We, the service personnel of Lexus of Concord wish to De Certify [sic] the Union as representative in negotiations for Health and Welfare. We the under signed [sic] in no way have

including insurance and business managers. She claims she did not know anything about the changes until the April 21 meeting, but she did not know if other agents and supervisors of Respondent knew. Obviously, Torian and his assistant knew prior to April 1. There was no explanation for her failure to date the announcement memorandum she distributed to employees. There was no explanation for the failure to determine if any notes or minutes were taken at the claimed April 21 meeting. Respondent failed to call these individuals and no reason was advanced for their absence. I find an adverse inference should be drawn from Respondent's failure to call them. *Property Resources Corp. v. NLRB,* supra. Another basis for not crediting her testimony is that she volunteered information. For example, she testified the changes to the 401(k) plan did not have anything to do with the Union but admittedly did not participate in the negotiations with the Union and had no involvement with the decision to change the 401(k) plan. Even absent an adverse inference, I find Chris Carvalho's demeanor unconvincing. She did not testify in a forthright manner. She appeared more interested in supporting a litigation theory than in testifying cadidly about events.

[10] Lichti was unsure of the date of the wage increase and altered his estimate of the date of the meeting where the wage increase was announced based on his review of his pay receipts. His estimate of the date of the meeting where Respondent announced the new 401(k) plan was based on his referencing the date of implementation against the date on the announcement. Lichti testified: ".[A]s I recall, we lost a couple of weeks of it already, because this is dated April 1st. I recall we lost a couple of weeks of—in the rollover. They already enacted the program without checking with us." I find this use of a reference point, similar to the use of his pay stubs, does not discredit Lichti's testimony, rather it lends support to the finding he is believable.

[11] As previously noted, the merger of the eight dealerships with Auto Nation was effective March 26.

[12] Initially Sharkey testified the April 1 plan was not a new plan but admitted he did not compare all the features of the plans. This tailoring of testimony demonstrates Sharkey was more interested in presenting evidence favorable to Respondent rather than testifying accurately.

been pressured by either concerned parties in our decision to end the Unions involvement in our work place.

By letter dated April 27, Respondent's counsel, by Rechtschaffen, informed the Union that Respondent "had received objective evidence that an overwhelming majority of its bargaining unit employees no longer wish to be represented by the Machinists Union." The Respondent stated it has a good-faith doubt the Union retained majority support in the unit. Thus, it considered further recognition and/or bargaining to be unlawful and it was withdrawing recognition from the Union.

The General Counsel argues Respondent was not privileged to withdraw recognition because of the settlement agreement, citing *Poole Foundry & Machine Co.*, 95 NLRB 34 (1951), enfd. 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952), and its progeny. Further, Respondent's withdrawal of recognition was tainted by unremedied unfair labor practices, i.e., the unilateral change in the 401(k) plan. Counsel for the General Counsel also argues withdrawal of recognition should be limited to those instances based on Board elections contrary to *Celanese Corp.*, 95 NLRB 664 (1951). I find this last argument beyond my authority to address for I am constrained to follow Board law.

3. Wage increase

Counsel for the General Counsel asserts the wage increases Respondent announced on May 6 or 7, and the letters the employees were requested to sign the next day constituted direct dealing and an unlawful unilateral change. Respondent claims it lawfully could make unilateral changes to unit employees' wages because it lawfully withdrew recognition from the Union.

According to Torian, he had a number of conversations with employee Scott DeHoff where DeHoff informed Torian other unit employees were ready to resign if they did not receive pay raises. Lichti had previously requested wage increases but his requests had been denied. Torian admitted his actions were based on DeHoff's information. On May 7, Torian held a meeting of all parts and service department employees as well as Don Carvalho, Romano and the new general manager, Greg Schiller. According to Lichti, Torian stood in front of the notice to employees posted pursuant to the above-described settlement, and said: "he's glad it's over. It's all behind us. Now we can move on and we're going to get the raises that we've been waiting for."

Torian denied saying he was glad it is over, that it is all behind us. I do not credit Torian's testimony except where it is credibly corroborated or constitutes an admission against interest based on his demeanor. He did not manifest a candid mean and manner. Torian exhibited poor recall, a portion of his testimony was elicited through the device of leading questions; his testimony was self-serving, exaggerated, and he appeared more interested in supporting a litigation theory than in testifying candidly about the events. At times, his answers were not responsive and other times were evasive.

After the raises were announced, the employees applauded. Lichti and one or two other employees inquired "what scale we were going up to. And [Don Carvalho] showed in the pamphlet the temporary agreement, basically what we would be going up to." The pamphlet was previously distributed to the employees and contained Respondent's last wage offer to the Union. Lichti also testified Don Carvalho stated Respondent would waive the training requirements contained in the booklet, substituting in lieu thereof time served. There is no claim the wages or any other terms and conditions of employment contained in this booklet constituted a final offer.

The following day, each unit employee was individually instructed over the public address system to report to Romano's office to sign a pay agreement. When Lichti was called to the office "[Romano] showed me the new pay scale that he had decided on, and said, 'this is what you're going to get paid. This is how we got to this point.'" Romano "explained that there was a base for my time there, and an addition for certain certifications that I had." Romano than asked Lichti to sign the document that increased his hourly pay rate from $18 to $24.25 per hour. The document also indicated Lichti would receive benefits. Lichti was requested to accept the compensation plan by signing the document at a line marked "signed/accepted." Respondent's other employees in the unit received similar increases and signed similar acceptances of individual compensation plans. Respondent admittedly did not notify or bargain with the Union about instituting these wage increases.

4. The June 15 information request

It is undisputed the Union's attorney requested information from Respondent. The evidence clearly demonstrates the requests were for the purpose of negotiating a contract and to ascertain the current terms and conditions of employment of the parts and service department employees. Specifically the letter requested:

1. A list of current employees including their names, dates of hire, rates of pay, job classification, last known address, phone number and date of completion of any probationary period.

2. A copy of all current company personnel policies, practices or procedures.

3. A statement and description of all company personnel policies, practices or procedures other than those mentioned in Number 2 above.

4. A copy of all company fringe benefit plans including pension, profit sharing, severance, stock incentive, vacation, health and welfare, apprenticeship, training, legal services, child care or any other plans which relate to the employees.

5. Copies of all current job descriptions.

6. Copies of any company wage or salary plans.

7. Copies of all disciplinary notices, warnings or records of disciplinary personnel actions for the last year.

8. A statement and description of all wage and salary plans which are not provided under number 6 above.

Respondent argues it does not have an obligation to provide this information for the Union no longer represents any of its employees. Respondent admits it did not provide any of the requested information.

III. ANALYSIS AND CONCLUSIONS

1. Alleged unlawful unilateral change of the 401(k) plan

The initial question is whether Respondent had an obligation to bargain with the Union about the changes to the 401(k) plan. The subject of pensions and retirement plans is a mandatory subject of bargaining. *Midwestern Power Systems*, 323 NLRB 61 (1997). An employer violates its bargaining obligation under Section 8(a)(5) and (1) of the Act if, without negotiating to

impasse, it makes unilateral changes in mandatory subjects of collective bargaining. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991) (citing *NLRB v. Katz*, 369 U.S. 736, 743 (1962). There is no claim and no evidence bargaining was at an impasse. On the contrary, shortly after Respondent unilaterally changed the 401(k) plan the parties met, delineated the remaining issues and the Union expressed its willingness to be flexible but requested additional information to facilitate bargaining. The statement of flexibility and request for information clearly establishes the Union did not waive its right to bargain over the 401(k) plan.).

Respondent considered and implemented the new 401(k) plan on April 1, prior to the last bargaining session on April 14. Respondent admits it did not inform and bargain with the Union concerning these changes. I find the changes to the plan were not de minimis. There were several features of the new 401(k) plan that were more favorable to the unit members, including immediate vesting, the ability to make daily changes in allocations, to withdraw contributions, and the increased ability to access their accounts. The volatility of investments clearly makes these changes significantly advantageous to the unit members. As the court noted in *Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60, 64–65 (1979), unilateral action "detracts from the legitimacy of the collective bargaining process by impairing the union's ability to function effectively, and by giving the impression to members that a union is powerless."

In this case Respondent and Union were in negotiations and thus the Respondent was obligated to refrain from unilateral changes until there is an impasse or agreement has been reached. *Visiting Nurse Services of Western Massachusetts v. NLRB*, 177 F.3d 52, 59 (1st Cir. 1999), petition for cert. filed 528 U.S. 1074 (1999). Exceptions to this rule are; if "economic exigencies compel prompt action, or, if the union engages in bargaining delay tactics." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enforced sub nom. *Master Window Cleaning v. NLRB*, 15 F.3d 1087 (9th Cir. 1994). Respondent admits it knew well before the last negotiating session it understood changes may be needed to the 401(k).

To establish the defense of economic exigency the Respondent must demonstrate the change was "caused by external events, [which were] beyond the employer's control, or was not reasonably foreseeable," and demanded prompt action. *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 82 (1995). The burden on the employer seeking to establish this defense is a "heavy" one. *Our Lady of Lourdes Health Center*, 306 NLRB 337, 340 fn. 6 (1992). There was no explanation proffered by Respondent for its failure to inform the Union of the possible need to modify the 401(k) plan. Respondent failed to demonstrate that all the changes were mandated by law and were not susceptible to collective bargaining. Further, as noted by counsel for the General Counsel, even if IRS regulations or the terms of the plan mandated these changes, the Respondent would be required to notify the Union prior to implementation. Additionally, there is no showing other changes that the Union may desire, would be precluded by IRS regulations or the terms of the plan. Respondent failed to demonstrate on the record there were such mandates. But assuming mandates existed, Respondent was required to notify the Union prior to implementation. See *Santa Rosa Blue Print Service,* 288 NLRB 762 (1988); *Pak-Mor Mfg. Co.*, 241 NLRB 801, 803 (1979).

Respondent failed to demonstrate there was insufficient time to bargain with the Union concerning the changes to the 401(k) plan. There was no evidence concerning when Respondent learned or determined to make changes to the 401(k) plan. The only information is that the changes were made prior to April 1, and implemented on April 1. Respondent was still bargaining with the Union at this time, and there was no evidence proffered which would support a finding that "economic exigencies compel prompt action." On the contrary, the Union expressed its willingness to be flexible. The negotiations to sell some of the dealerships commenced months prior to the changes in the 401(k) plan and the ramifications of those negotiations could have been discussed with the Union well before April 1 and 14.

Respondent failed to present evidence by an expert in the complex field of 401(k) plans and failed to indicate there were any circumstances of the sale negotiations that required or warranted its unilateral action. The Respondent did not present any testimony it did not know well in advance of April 1, the sale of some of the Tasha Group dealerships would result in a need to change Respondent's 401(k) plan. There was no evidence all the changes were mandated by law or other factors beyond Respondent's control. Respondent did not have any representative of the insurance company handling its 401(k) plan testify. There was no testimony concerning the negotiations for the sale of some of the dealerships. Thus, there is no credible basis to find the letter from Auto Nation concerning the 401(k) plan was a surprise necessitating immediate action and precluding bargaining. In sum, the Respondent failed to meet its burden the sale of some of the Tasha Group dealerships constituted an "economic exigency." To find otherwise would permit employers involved in the sale of a portion of any business to unilaterally change terms and conditions of employment. Such an argument falls very short of the requirement to demonstrate an economic exigency.

I also find without merit Respondent's claim it was relieved from its obligation to bargain with the Union about the changes to the 401(k) plan because it hid the changes from the Union by not announcing them until after it received the petition signed by 19 of its employees. I found above that Lichti's testimony establishes Respondent announced the changes before the employees signed the petition. Moreover, as discussed below, the mandates established in *Poole Foundry*, 95 NLRB 34 (1951), enfd. 192 F.2d 749 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952), required Respondent to bargain with the Union even after it received the petition. The Respondent acknowledged in the settlement agreement it executed on February 11, less than two months before it unilaterally changed the 401(k) plan, that the Union was the majority representative of its employees. The negotiating session of April 14, was another such acknowledgement. Thus, even assuming arguendo, the announcement of the changes to the 401(k) plan occurred after the 19 employees signed the petition, the unilateral change predated Respondent's receipt of the petition and Respondent has failed to adduce any evidence it held any concerns regarding the Union's majority status at the times it made and implemented these changes.

Similarly, there is no predicate for finding the Union was engaging in delay tactics. Bargaining occurred over a protracted period of time, with a hiatus during the pendency of unfair labor practice charges. After those charges were settled, negotiations were again scheduled. There is no evidence the Union delayed the negotiations. There is no evidence to support a claim the Union engaged in bargaining delay tactics, and thus, waived its right to bargain over the 401(k) plan. In this case, the

Respondent readily admits it unilaterally implemented changes to its 401(k) plan and negotiations for a contract were not at impasse. I find Respondent has failed to establish a valid defense for the unilateral change to the 401(k) plan. Accordingly, I find such action violated Section 8(a)(5) and (1) of the Act.

2. Alleged unlawful refusal to bargain

The settlement agreement involved unilateral changes and direct dealing, and the notice appended to the agreement and posted by Respondent included the provision the Respondent would bargain in good faith with the Union as the "exclusive bargaining representative of our employees" in the unit.[13] Thus the settlement agreement bound Respondent to bargain with the Union in good faith for a reasonable time thereafter "without regard to whether or not there are fluctuations in the majority status of the union during that period." *Poole Foundry,* supra. In its brief, Respondent attempted to analogize its settlement to settlements of violations of Section 8(a)(1) and or (3) of the Act. Those cases are not applicable because the settlement in the instant case contained a bargaining provision. As the Board noted in *Poole Foundry,* supra

> [A] settlement agreement containing a bargaining provision, if it is to achieve its purpose, must be treated as giving the parties thereto a reasonable time in which to conclude a contract. We therefor hold that after providing in the settlement agreement that it would bargain with the Union, the R was under an obligation to honor that agreement for a reasonable time after its execution without question the representative status of the Union.

In *Poole Foundry,* the Respondent signed the settlement agreement on December 27, 1949, and the Board found a reasonable time had not yet elapsed on April 10, 1950. In the instant case, less time had elapsed. The parties bargained on April 14, about 2 weeks before Respondent refused to bargain, on the grounds the Union did not represent a majority of the unit employees. Thus, I conclude a reasonable amount of time had not yet elapsed by April 19. As the court noted in *Poole Foundry & Machine Co. v. NLRB*, supra, 192 F.2d 740, 743–744:

> We are not unmindful of Poole's contention that the Board's order denies to the employees the right to choose freely their representative in collective bargaining—a right expressly guaranteed by Sections 7, 8(a)(5), 9(a) and 9(c)(1) and (3) of the Act as amended, 29 U.S.C.A §157, 158(a)(5) and 159(c)(1) and (5). These employees are free to file a decertification petition after the settlement agreement has been in effect a reasonable length of time.
>
> While not an admission of past liability, a settlement agreement does constitute a basis for future liability and the parties recognize a status thereby fixed. Thus, for example, a settlement agreement providing for the reinstatement of employees fixes their eligibility to vote in a Board election and a settlement providing for the disestablishment of a dominated union necessarily affects its right to appear on a ballot. An entire structure or course of future labor relationships may well be bottomed upon the binding effect of a status fixed by the terms of a settlement agreement. If a settlement agreement is to have real force, it would seem that a reasonable time must be afforded in which a status fixed by the agreement is to operate. Otherwise, settlement agreements might indeed have little practical effect as an amicable and judicious means to expeditious disposal of disputes arising under the terms of the Act. Thus, it follows that Poole, after having solemnly agreed to bargain with the Union, should not be permitted, within three and one-half months after the agreement, to refuse to bargain, even if, as here, the Union clearly did not represent a majority of the employees.

That the settlement agreement was unilateral does not alter the policy established in *Poole Foundry*. For example, in *Liberty Fabrics, Inc.*, 327 NLRB 38 (1998); the Board refused to process a decertification petition where unfair labor practice charges predating the petition were resolved in a private settlement because, as part of the resolution of the dispute, the employer recognized its bargaining obligation to the Union. I find the settlement agreement, including the notice in this case, contained an agreement by the Respondent to bargain collectively with the Union for a reasonable period of time. See also *Douglas-Randall, Inc.*, 320 NLRB 431 (1995). Respondent breached the settlement agreement by unlawfully unilaterally significantly modifying the 401(k) plan.

During the period between the execution of the settlement agreement and the withdrawal of recognition, the parties met once for a short time. The Union, for the first time, was informed Respondent was no longer part of Tasha Group. The Union requested additional information to assist in the resolution of the three remaining issues, including "each employees participation in the Employer's 401(k) plan." At the conclusion of the April 14 negotiation session, there was an understanding the parties were to meet again. Respondent argues the negotiations prior to the settlement agreement should be considered in determining if the parties bargained for a reasonable periods of time. I find this argument to be unpersuasive. The commitment to bargain with the Union encompassed in the settlement agreement and accompanying notice established the commencement of the reasonable time requirement. The attenuated bargaining session of April 14, with the clear intent to meet again, accompanied by Respondent's prior unlawful unilateral change to the 401(k) plan, a matter raised on April 14, require the conclusion the parties have not bargained for a reasonable period of time. *King Scoopers, Inc.*, 295 NLRB 35 (1989). In fact, this unilateral change requires a finding Respondent did not resume negotiations on April 14 in good faith.

Even absent the holdings of *Poole Foundry*, I find Respondent's unlawful unilateral changes in the 401(k) plan constitute an unlawful refusal to recognize and bargain with the Union. In *Karp Metal Products*, 51 NLRB 621, 624 (1943), the Board recognized,

> [e]mployees join unions in order to secure collective bargaining. Whether or not the employer bargains with a union chosen by his employees is normally decisive of its ability to secure and retain its members. [Footnote omitted.] Consequently, the result of an unremedied refusal to bargain with a union, standing alone, is to discredit the organization in the eyes of the employees, to drive them to a second choice, or to persuade them to abandon collective-bargaining altogether. . . ." Cf. *Machinists v. NLRB*, 311 U.S. 72, 82; *NLRB v Pennsylvania Greyhound Lines,* 303 U.S. 261, 271; *Texas &*

[13] The settlement agreement also contained the standard provision that Respondent would not interfere with its employees exercise of their rights under Sec. 7 of the Act.

N.O.R. Co. v. Brotherhood of Railway Clerks, 281 U.S. 548, 568–569.

As the Board noted in *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996), an employer's refusal to recognize and bargain, as evidenced by an unlawful unilateral change in mandatory terms and conditions of employment, "is not a mere technical infraction. It is a most serious violation that 'strikes at the heart of the Union's legitimate role as representative of the employees.' [*Midway Golden Dawn*, 293 NLRB 152, 152 fn. 2 (1989)]. If a union is unlawfully deprived of the opportunity to represent the employees, it is altogether foreseeable that the employees will soon become disenchanted with that union, because it apparently can do nothing for them. [*Caterair International*, 322 NLRB 64, 67 (1996)]. This later consideration, we emphasize, does not depend on whether the employees actually know that the employer is unlawfully refusing to deal with the union."

While *Lee Lumber* dealt with lengthy delays in bargaining caused by the employer's unlawful refusal to bargain, in this case there is protracted bargaining, charges of unlawful unilateral changes and direct dealing resolved by a settlement agreement containing a notice to employees promising to bargain in good faith with the Union which was recognized as the majority representative of the unit employees, followed by another unlawful unilateral change in terms and conditions of employment. In *Lee Lumber*, id. at 178, the Board held:

> For the foregoing reasons, we reaffirm the Board's practice of presuming that, when an employer unlawfully fails or refuses to recognize and bargain with an incumbent union, any employee disaffection from the union that arises during the course of that failure or refusal results from the earlier unlawful conduct. In the absence of unusual circumstances,[14] we find that this presumption of unlawful taint can be rebutted only by an employer's showing that employee disaffection arose after the employer resumed its recognition of the union and bargained for a reasonable period of time without committing any additional unfair labor practices that would detrimentally affect the bargaining. Only such a showing of bargaining for a reasonable time will rebut the presumption.

Here, the Respondent refused to recognize and bargain with the Union when it unlawfully unilaterally changed the 401(k) plan on April 1. The unilateral change occurred about 3-1/2 weeks before the employees signed the petition. Such an unfair labor practice is likely to undermine support for a union, thus Respondent could not lawfully rely on an antiunion petition signed in this circumstance of an unremedied unfair labor practice and within the reasonable time bargaining period contained in the settlement agreement. I find the unremedied unfair labor practice meets the test in *Master Slack Corp.*, 271 NLRB 78, 84 (1984).[15]

As noted in *Lee Lumber*, this refusal to bargain has the tendency to cause disaffection with the union and induce employee determination to decertify the Union. The employees applauded the announced changes to the 401(k) plan. That the changes to the 401(k) plan were beneficial to the employees only serves to increase their disaffection with the Union. The evidence of subsequent loss of majority support is thus tainted and there is a presumption majority support continues inasmuch as the Respondent has not bargained for a reasonable period of time before it withdrew recognition.

3. Alleged unlawful change in wage rates

On or about May 6, shortly after Respondent withdrew recognition of the Union on April 27, Torian, with Supervisors Carvalho, Romano, and new General Manager Greg Schiller, announced to the unit members, "he's glad it's over. It's all behind us. Now we can move on and we're going to get the raises that we've been waiting for." The employees applauded the announcement. It is undisputed the wage increases were announced and implemented without giving the Union prior notice and an opportunity to bargain. As previously found, there was no evidence of a impasse or other valid basis for Respondent's unilateral action.

One employee inquired what the amount of the raise was and Torian replied they would receive the raises contained in Respondent's last offer to the Union. Lichti's wages went from $18 per hour to $24.25 per hour, including a 50-cent-per-hour increment for having a smog license. Lichti asked what Respondent would do concerning training. Carvalho answered Respondent "would waive the training in lieu of time there." Lichti had previously requested raises from Romano and was told "he couldn't do it because the negotiations were ongoing."

Having found Respondent continued to have a bargaining obligation after it withdrew recognition, including on and after May 6, the wage increase constituted an unlawful unilateral change in a mandatory subject of bargaining in violation of Section 8(a)(5) and (1) of the Act. *Peat Mfg. Co.*, 251 NLRB 1117 fn. 4 (1980).

4. Alleged unlawful direct dealing

It is unquestioned Respondent dealt directly with its employees and on May 7, had them, as a quid pro quo for receiving the raises, sign an individual compensation plan which provided "IT IS UNDERSTOOD THAT THE ENTIRE PAY PROGRAM IS CONTAINED IN THIS AGREEMENT, AND THAT THERE ARE NO OTHER PROMISES, EITHER WRITTEN OR VERBAL BY THE EMPLOYER. . . . *EMPLOYMENT AND COMPENSATION ARE FOR NO FIXED TERM AND MAY BE TERMINATED AT ANY TIME WITH OR WITHOUT CAUSE OR NOTICE, BY EITHER THE EMPLOYEE OF THE EMPLOYER.* [Emphasis in original.]

As the Board found in *Royal Motor Sales*, supra:

> It is well established that an employer violates Section 8(a)(5) and (1) of the Act by meeting with employees to discuss wages without the presence of their designated collective-bargaining representative. See, e.g., *Limpco Mfg., Inc.*, 225 NLRB 987, 990 (1976); *Bueter Bakery Corp.*, 223 NLRB 888, 890 (1976). Such direct dealing, particularly when negotiations with the union are occurring, is inconsistent with the employer's statutory bargaining obligation, tends to undermine the status of the bargaining agent, and interfere with employees' Section 7 rights. See *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683–684 (1944).

[14] These would be comparable to the "unusual circumstances" that would permit a challenge to a newly certified union during the certification year. The Board and courts have construed those circumstances narrowly. See *Ray Brooks v. NLRB*, 348 U.S. at 98–99. None of these circumstances have been demonstrated to be operative in this case.

[15] For example, in *NLRB v. Powell Electric Mfg. Co.*, 906 F.2d 1007, 1014 (5th Cir. 1990), the unilateral implementation of a contract offer without valid impasse was found to have contributed to employee dissatisfaction and tainted the petition upon which withdrawal of recognition was predicated. See also *Toyota of San Francisco*, 280 NLRB 784, 804 (1986); *Royal Motor Sales*, 329 NLRB 760 (1999).

Respondent clearly dealt directly with unit employees during the meeting led by Torian and later during the individual meetings when the employees were each called to personally meet with Romano to discuss, accept and execute their personalized compensation plans. Inasmuch as the petition on which Respondent relied was tainted and based on this taint and the continuing bargaining obligation imposed by the *Poole Foundry* decision, supra, Respondent's direct dealing was a violation of Section 8(a)(5) and (1) of the Act.

5. Alleged unlawful failure to provide relevant information

It is undisputed the Union's attorney requested on June 15 specific information which Respondent refused to provide based on its reliance on the employee petition. I have found Respondent's reliance on this petition is improper and Respondent still has a collective-bargaining obligation to meet and negotiate with the Union as its unit employees collective-bargaining representative.

It is unquestioned Respondent failed to provide the Union the previously described requested information. The Union requested information concerning the individuals in the unit and their terms and conditions of employment. These are individuals employed within the bargaining unit the Union represents thus, that information is "presumptively relevant" to the Union's proper performance of its collective-bargaining duties. The basis for the presumption is this information is at the core of the employee-employer relationship," *Graphics Communications Local 13 v. NLRB*, 598 F.2d 267, 271 fn. 5 (D.C. Cir. 1959), and is relevant by its "very nature." *Emeryville Research Center v. NLRB*, 441 F.2d 880, 887 (9th Cir. 1971). Respondent has not clearly and convincingly rebutted this presumption of relevance.

The Board uses a broad, discovery-type standard in determining relevance in information requests, including those for which a special demonstration of relevance is needed, and potential or probable relevance is sufficient to give rise to an employer's obligation to provide information. *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994).

As noted in *GTE California*, 324 NLRB 424, 426 (1997),

> An employer has a statutory obligation to provide requested information that is potentially relevant and will be of use to a union in fulfilling its responsibilities as the employees' exclusive bargaining representative, including its responsibilities regarding processing grievances. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). . . .
>
> A union's interest in relevant and necessary information, however, does not always predominate over other legitimate interests. As the Supreme Court explained in *[Detroit Edison Co. v. NLRB*, 440 U.S. 301, 314 (1979)] "a union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested." Thus, in dealing with union requests for relevant but assertedly confidential information possessed by an employer, the Board is required to balance a union's need for the information against any legitimate and substantial confidentiality interest established by the employer. See, e.g., *Exon Co. USA*, 321 NLRB 896 (1996); *Good Life Beverage Co.*, 312 NLRB 1060 (1993); *Pennsylvania Power & Light Co.*, [301 NLRB 1104 (1991)]; *Howard University*, 290 NLRB 1006 (1988).

I find Respondent's bare claim the requested information does not meet the test of relevance unconvincing. Assuming the information is not presumptively relevant, the request meets the broad standard of relevance and is sufficiently important or necessary to invite the statutory obligation of Respondent to comply with the request. *Postal Service*, 307 NLRB 429 (1992); *Columbus Products Co.,* 259 NLRB 220 (1981). The Union was seeking to determine who was in the unit, and the terms and conditions of their employment to become current on existing terms and conditions of employment, particularly in view of the sale of some of the dealerships and the unilateral changes in the employees terms and conditions of employment. The evidence amply demonstrated the probable and potential relevance of the requested information in fulfilling its statutory representative duties. It specifically requested the information to effectively negotiate an initial collective-bargaining agreement and pursue its other representational obligations.

Respondent had an affirmative duty to request clarification if it did not understand the Union's entreaties. As the Board held in *National Electrical Contractors Assn., Birmingham Chapter*, 313 NLRB 770, 771 (1994): "[i]t is well established that an employer may not simply refuse to comply with an ambiguous and/or overbroad information request, but must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information." *Keauhou Beach Hotel*, 298 NLRB 702 (1990).[16] There is no claim the information requested was confidential and proprietary.

Based on the foregoing, I find Respondent violated Section 8(a)(5) and (1) as alleged in the complaint, by failing since June 15, 1999, to furnish the Union with the requested information.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the exclusive representative for the purposes of collective bargaining of the employees in the following appropriate unit within the meaning of Section 9(a) of the Act:

> All full-time and regular part-time technicians, parts department employees, including parts drivers, and detailers, employed by Respondent at its Concord, California facility; excluding sales employees, all other employees, office clerical employees, and parts managers, guards, and supervisors as defined in the Act.

4. By unlawfully unilaterally changing the 401(k) plan, by withdrawing recognition from the Union when a reasonable amount of time had not elapsed following Respondent's execution of the settlement agreement; by withdrawing recognition based on an employee petition when such petition was tainted by Respondent's unlawful unilateral change in the 401(k) plan;

[16] The Board held in *Keauhou:*

> Moreover, even if the Union's request was ambiguous and/or intended to include information regarding nonunit employees when made, this would not excuse the Respondent's blanket refusal to comply. It is well established that an employer may not simply refuse to comply with an ambiguous and/or overbroad information request, but must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information.

See, e.g., *A-Plus Roofing*, 295 NLRB 967, 972 (1989); *Barnard Engineering Co.*, 282 NLRB 617, 621 (1987); and *Colgate-Palmolive, Co.*, 261 NLRB 90, 92 fn. 12 (1982).

by unlawfully unilaterally changing employees wages, by directly dealing with employees concerning the wage increases, and by failing and refusing to furnish the Union with requested information relevant to the Union's proper performance of its collective-bargaining duties as the exclusive bargaining representative of an appropriate unit of the Respondent's employees, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by: unlawfully unilaterally changing the 401(k) plan, by withdrawing recognition from the Union when a reasonable amount of time had not elapsed following Respondent's execution of the settlement agreement; withdrawing recognition based upon an employee petition when such petition was tainted by Respondent's unlawful unilateral change in the 401(k) plan; unlawfully unilaterally changing employees wages, directly dealing with employees concerning the wage increases, and failing and refusing to furnish the Union with requested information relevant to the Union's proper performance of its collective-bargaining duties as the exclusive bargaining representative of an appropriate unit of the Respondent's employees, which, Respondent was obligated to furnish, I shall recommend, among other things, that Respondent recognize and bargain with the Union, furnish the requested information which I have found it was legally obligated to furnish, and if requested by the Union, to immediately rescind the unlawful unilateral changes to the 401(k) plan and wages, and make whole those employees, if any, who suffered financial loss due to the unilateral changes, to be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1978). I also recommend Respondent be ordered to cease and desist from these actions found unlawful, and take certain affirmative action to effectuate the policies of the Act, including the posting of a notice marked "Appendix."

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Lexus of Concord, Inc., Concord, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with the Union by: unlawfully unilaterally changing the 401(k) plan; withdrawing recognition from the Union when a reasonable amount of time had not elapsed following Respondent's execution of the settlement agreement; withdrawing recognition based upon an employee petition when such petition was tainted by Respondent's unlawful unilateral change in the 401(k) plan; unlawfully unilaterally changing employees wages; directly dealing with employees concerning the wage increases; and, by failing and refusing to furnish the Union with requested information relevant to the Union's proper performance of its collective-bargaining duties as the exclusive bargaining representative of an appropriate unit of the Respondent's employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain in good faith with the Union concerning wages, hours, and other terms and conditions of employment.

(b) On request from the Union, rescind the April 1, 1999 revision of the 401(k) plan.

(c) On request by the Union restore the pre-May 7, 1999 wage rates.

(d) Make whole any employees, where applicable, for any losses sustained by reason of the unilateral changes effected by Respondent and the unlawful withdrawal of recognition, as provided in the remedy section of this decision.

(e) Preserve and, within 14 days of a request, make available to the Board and its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the nature and extent of any restoration of wages or benefits under the remedy section of this decision.

(f) Within 14 days after service by the Regional Director, post at its Walnut Creek facility copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced or covered by other material. In the event that, during the pendancy of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since April 1, 1999.

(g) Within 21 days after service by the Regional Director, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain in good faith with Machinists Automotive Trades District Lodge 190, Local Lodge 1173 International Association of Machinists and Aerospace Workers, AFL–CIO by failing and refusing to bargain in good faith with the Union by: unlawfully unilaterally changing the 401(k) plan; withdrawing recognition from the Union when a reasonable amount of time had not elapsed following Respondent's execution of the settlement agreement; withdrawing recognition based on an employee petition when such petition was tainted by Respondent's unlawful unilateral change in the 401(k) plan; unlawfully unilaterally changing employees wages; directly dealing with employees concerning the wage increases; and, by failing and refusing to furnish the Union with requested information relevant to the Union's proper performance of its collective-bargaining duties as the exclusive bargaining representative of an appropriate unit of the Respondent's employees.

WE WILL recognize and bargain in good faith with Machinists Automotive Trades District Lodge 190, Local Lodge 1173 International Association of Machinists and Aerospace Workers, AFL–CIO, including advance notification to the Union of any intent by us to change your terms and conditions of employment and by giving the Union an opportunity to bargain about any changes in terms and conditions of employment. The appropriate unit is:

> All full-time and regular part-time technicians, parts department employees, including parts drivers, and detailers, employed by the Employer at its Concord, California facility; excluding sales employees, all other employees, office clerical employees, and parts managers, guards, and supervisors as defined in the Act.

WE WILL furnish the Union the information requested June 15, 1999, which the National Labor Relations Board found we were obligated to provide under the National Labor Relations Act.

WE WILL, on the request of the Union, restore to the employees in the bargaining unit the 401(k) plan that was in effect before April 1, 1999.

WE WILL, On the request of the Union, restore the wages and other terms and conditions of employment that were in effect before May 7, 1999.

WE WILL make whole our employees for any lost wages or benefits they suffered as a result of out unilateral changes to the 401(k) plan and wage rates.

WE WILL NOT in any like or related manner interfere with, restrain or coerce, any of you in the exercise of rights guaranteed you by Section 7 of the Act.

LEXUS OF CONCORD, INC.